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THE FOURTH AMENDMENT AND POLICE-CITIZEN CONFRONTATIONS

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Police "field interrogation" which may or may not result in prosecution, based upon standards less stringent than the fourth amendment's "probable cause" requirement, has recently been the subject of several Supreme Court decisions. The author reviews these cases from the point of view of the adequacy of the Court's response to two major questions relating to field interrogation: (1) Whether police may use this device upon a person they believe is *about* to commit a crime; and (2) Whether "consent" doctrines should be given legal recognition in the context of field interrogation.

The question of the constitutionality of police field interrogation practices has generated great interest in the past several years. Although courts have litigated this question for decades,¹ a major discussion of the problem did not appear in legal literature until 1960.² In 1964 the New York legislature enacted a statute authorizing police to stop and frisk suspects who could not be arrested.³ That statute attracted considerable attention to the problem. Since then, the frequency of litigation of field interrogation issues has increased, and over fifty publications now exist on the subject. The problem has been discussed extensively by the American Law Institute in connection with the initial draft of the *Model Code of Pre-Arrest Procedure*⁴ and in the American Bar Foundation's Survey of Administration of Criminal Justice in the United States.⁵ The report of the President's Commission on Law Enforcement and Administration of Justice discussed the practice briefly and concluded that police authority

to stop, question, and frisk suspicious persons who cannot be arrested should be made explicit.⁶

The Court gave an opinion on that question for the first time in 1968.⁷ The caution with which they did so reflects the legal complexity of the problems associated with police on-the-street practices (particularly those motivated by a desire to prevent crime); the exceptionally divergent responses to those practices in case law and legal literature, and the recognition that police-citizen confrontations on the street are major contributing factors to increased racial tensions. The Task Force on Police concluded that:

"Misuse of field interrogations . . . is causing serious friction with minority groups in many localities. This is becoming particularly true as more police departments adopt 'aggressive patrol' in which officers are encouraged routinely to stop and question persons on the

¹ California has the most extensive case law on field interrogation, and its development there is traceable to *Giske v. Sanders*, 9 Cal. App. 13, 98 Pac. 43 (1908).

² Remington, *The Law Relating to "on the Street" Detention, Questioning and Frisking of Suspected Persons and Police Arrest Privileges in General*, 51 J. CRIM. L.C. & P.S. 386 (1960).

³ N.Y. CODE CRIM. PROC. §180-a (McKinney Supp. 1967).

⁴ ALI MODEL CODE OF PRE-ARRESTMENT PROCEDURE §2.02 (Tent. Draft No. 1, 1966). The discussion of this section is reported in 43 ALI PROCEEDINGS 52-157 (1966).

⁵ LAFAYE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 289-97 (1965); TIFFANY, MCINTYRE & ROTENBERG, DETECTION OF CRIME: STOPPING AND QUESTIONING, SEARCH AND SEIZURE, ENCOURAGEMENT AND ENTRAPMENT 6-94 (1967) [hereinafter cited as DETECTION]. Descriptive material is also found in AMERICAN BAR FOUNDATION, LAW ENFORCEMENT IN THE METROPOLIS 18-22 (1967).

⁶ THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 95 (1967). See also THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 183-86 (1967). Supporting documents treat the problems in more detail. See V FIELD SURVEYS, THE NAT'L CENTER ON POLICE AND COMMUNITY RELATIONS AT MICHIGAN STATE UNIVERSITY, A NATIONAL SURVEY OF POLICE AND COMMUNITY RELATIONS 327-36 (1967); IV FIELD SURVEYS, LOHMAN & MISNER, THE POLICE AND THE COMMUNITY: THE DYNAMICS OF THEIR RELATIONSHIP IN A CHANGING SOCIETY (Vols. 1 & 2, 1967); Black & Reiss, *Patterns of Behavior in Police and Citizen Transactions*, in III FIELD SURVEYS, 2 STUDIES OF CRIME AND LAW ENFORCEMENT IN MAJOR METROPOLITAN AREAS (1967).

⁷ *Terry v. Ohio*, 392 U.S. 1 (1968), and *Sibron v. New York*, 392 U.S. 40 (1968). *Sibron* is a consolidation of two cases, the other one being *Peters v. New York*. *Certiorari* was dismissed in a fourth case as improvidently granted. *Wainwright v. City of New Orleans*, 392 U.S. 598 (1968).

street who are unknown to them, who are suspicious, or whose purpose for being abroad is not readily evident. The Michigan State survey found that both minority group leaders and persons sympathetic to minority groups throughout the country were almost unanimous in labelling field interrogation as a principal problem in police-community relations."⁸

The Chief Justice gave recognition to the importance of the question: "We would," he wrote, "be less than candid if we did not acknowledge that this question thrusts to the fore difficult and troublesome issues regarding a sensitive area of police activity—issues which have never before been squarely presented to this Court."⁹

There are many difficult issues involved in the field interrogation controversy, and it would have been surprising had the Court tried to resolve a major part of them. But it is equally surprising how narrow the scope of the decisions was. *Terry*, the most important of the cases, holds only that when an officer is investigating a suspicious person the officer may frisk him for dangerous weapons if he has evidence that reasonably leads him to believe that the suspect is armed and dangerous. Such a search is not unreasonable under the fourth amendment despite the lack of probable cause to arrest if it is limited to patting down the exterior clothing of the suspect. The authority to frisk is superfluous when the officer arrests on probable cause and searches the suspect incident to that arrest.

The Court did not deal with the problem of detention prior to frisking, with interrogation, or with the constitutionality of the New York stop-and-frisk statute. These are issues which many observers believed were central to the litigation of these three cases. The Court also failed to say whether states may still choose to define suspicious conduct as a substantive offense to permit arrest

and conviction under circumstances which, under *Terry*, would only permit a frisk.¹⁰ They did not discuss the admissibility of evidence other than weapons turned up by a *Terry* frisk. The number of issues left undecided are sufficient to encourage litigation for years to come. The reasons why these opinions are so narrow in scope must obviously be speculative at this time, but the answer may be important to an accurate appraisal of these decisions.

The first explanation is the most obvious: The issues involved in police field interrogation practices are so difficult to resolve and so new to the Court that they could not reach acceptable agreement on any question beyond the need to frisk under *Terry* circumstances. A second explanation is also possible: The actual consensus may have been to avoid these issues, not because the Court could not reach sufficient agreement on them, but because the Court thought it would be unwise to adopt fixed rules on the first occasion of significant national awareness of the problems inherent in these practices. These explanations are not mutually exclusive, of course, but the second explanation, which suggests a wait-and-see posture, carries with it important implications about the responsibility of police departments for field interrogation practices.

Police departments typically have eschewed public acknowledgment of any responsibility for policy formulation.¹¹ Even less often have they initiated and involved themselves in public evaluation of whatever policies might exist within their departments. Most departments have behaved this way with respect to field interrogation practices. Indeed, many deny they stop and question suspects who may not be arrested.

One consequence of the failure of the police to permit critical and public evaluation of their practices is that courts are forced to do so without the benefit of any significant agency or community

⁸ THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 184 (1967).

⁹ *Terry v. Ohio*, 392 U.S. 1, 9-10 (1968). The issue was presented to the Court by the government in *Rios v. United States*, 364 U.S. 253 (1960). The government there had argued "that a police officer may stop any person for the purpose of inquiry on less information than would constitute probable cause for arrest; and that any temporary detention that may be involved in the act of making inquiry does not constitute an arrest." Brief for United States, p. 24. *Rios* is discussed more fully in Tiffany, *Field Interrogation: Administrative, Judicial and Legislative Approaches*, 43 DENVER L.J. 389, 401-04 (1966).

¹⁰ In addition to a statute which authorizes field interrogation, New York also has a statute which provides that a person is guilty of loitering when he:

Loiters, remains or wanders in or about a place without apparent reason and under circumstances which justify suspicion that he may be engaged or about to engage in crime, and, upon inquiry by a peace officer, refuses to identify himself or fails to give a reasonably credible account of his conduct and purposes.

N.Y. PENAL LAW §240.35(6) (McKinney Supp. 1967). The statute is discussed in Schwartz, *Stop and Frisk*, 58 J. CRIM. L.C. & P.S. 433, 459 (1967).

¹¹ LAFAVE, *supra* note 5, at 510-14.

participation in the decision-making process. Secondly, it should not be surprising if much of the public continues to be hostile toward police practices when there has been no opportunity for public participation in formulation of the policies underlying those practices.

It is true that the Court in *Terry* deliberately adopted a wait-and-see attitude toward field interrogation practices, then the obligation of local officials—particularly the police—is clear. For whatever reasons, departments now have the opportunity to begin the process of publicly developing fair and workable standards to guide their on-the-street practices and to develop adequate control mechanisms to insure compliance with them.

But development of evidentiary and procedural standards to which police ought to adhere in conducting field interrogations will be retarded to the extent that antecedent questions about the scope of field interrogation authority are left unresolved. The effort here is not to reexamine the full range of issues involved in these practices. It is, instead, to focus attention on two questions that are of fundamental importance in any attempt to resolve problems relating to field interrogation and to examine the adequacy of the Court's response to these questions. The first of these questions is whether police may properly use field interrogation to control the conduct of a person they believe is about to commit a crime. The second question is whether notions about consent ought to be given legal recognition in the field interrogation context. These questions are raised following a brief discussion of the three opinions.

A SUMMARY OF THE CASES

Terry v. Ohio. A Cleveland detective observed Terry and co-defendant Chilton engaged in behavior that suggested to him they were "casing" a downtown store for a daylight robbery. For ten or twelve minutes they engaged in repeated observations of the store and then returned to converse with one another on a streetcorner. During this time, a third man, Katz, briefly conversed with both of them on the corner. Terry and Chilton left the streetcorner and walked in the opposite direction from the store they had been observing. As they again met with Katz, the detective approached the three men and asked their names. He testified that he received a "mumbled" response. He turned Terry around, frisked him, and felt a hard object which he believed to be a gun in the

breast pocket of his overcoat but was unable to remove it. He ordered all three men into a nearby store, removed Terry's overcoat, and retrieved a gun. He ordered all three men to raise their hands and face the wall. A frisk of Chilton also turned up a gun. Terry was convicted of carrying a concealed weapon after his pretrial motion to suppress the gun was denied by the trial court.

An Ohio Court of Appeals¹² held that the activities of the defendant were sufficiently suspicious to permit inquiry and that an officer may frisk for self-protection incident to such an inquiry. The Supreme Court of Ohio dismissed petitioner's appeal on the ground that no substantial constitutional question was involved,¹³ and the United States Supreme Court granted certiorari.¹⁴

In an eight-to-one decision, the Court affirmed the conviction. Chief Justice Warren wrote the majority opinion, concurred in by Justices Brennan, Stewart, Fortas, and Marshall. Justices Harlan, Black, and White wrote separate concurring opinions. Justice Douglas dissented.

The defense argued that the Court should not legitimate any interference with a citizen in the absence of probable cause to arrest because to do so would lend unwanted support to other, more objectionable practices than those involved in this case. The Court acknowledged that such practices do occur but replied that "a rigid and unthinking application of the exclusionary rule, in futile protest against practices which it can never be used effectively to control, may exact a high toll in human injury and frustration of efforts to prevent crime."¹⁵

On the government's side, the argument was made that the practices involved in this case were insufficiently odious to call the fourth amendment into play because the actions of the officer did not constitute a "search" or an "arrest." But the Court avoided their previous arrest-or-nothing type of analysis and concluded that the practices were sufficiently odious to require justification even though they do not amount to "arrests."¹⁶ They

¹² *State v. Terry*, 5 Ohio App. 2d 122, 214 N.E.2d 114 (Cuyahoga County 1966).

¹³ *Terry v. Ohio*, 392 U.S. 1, 8 (1968).

¹⁴ 387 U.S. 929 (1967).

¹⁵ *Terry v. Ohio*, 392 U.S. 1, 15 (1968).

¹⁶ The arrest-or-nothing approach was used in *Rios v. United States*, 364 U.S. 253 (1960), *Henry v. United States*, 361 U.S. 98 (1959), and *Brinegar v. United States*, 338 U.S. 160 (1949). The statement in *Rios* is typical:

But the Government argues that the policeman approached the standing taxi only for the purpose

are subject to fourth amendment standards including the application of the exclusionary rule when such standards are violated.

Those standards are not satisfied by good faith of the officer. The action must be based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."¹⁷ The interest in crime detection and prevention as well as the need to protect himself and others justified the frisk in this case. The majority held:

"Our evaluation of the proper balance that has to be struck in this type of case leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime."¹⁸

Sibron v. New York. Although *Sibron* and *Peters* were decided in the same opinion by the majority of the Court, they are more clearly discussed as separate cases. Arresting Officer Martin, during eight hours of patrol, observed Sibron

in conversation with six or eight persons whom he . . . knew from past experience to be narcotics addicts. The officer testified that he did not overhear any of these conversations, and that he did not see anything pass between Sibron and any of the others. Late in the evening Sibron entered a restaurant. Patrolman Martin saw Sibron speak with three more known addicts inside the restaurant. Once again, nothing was overheard and nothing was seen to pass between Sibron and the addicts. Sibron sat down and ordered pie and coffee, and as he was eating Patrolman Martin approached him and told him to come outside.

of routine interrogation, and that they had no intent to detain the petitioner beyond the momentary requirements of such a mission. If the petitioner thereafter voluntarily revealed the package of narcotics to the officers' view, a lawful arrest could then have been supported by their reasonable cause to believe that a felony was being committed in their presence. The validity of the search thus turns upon the narrow question of when the arrest occurred, and the answer to that question depends upon an evaluation of the conflicting testimony of those who were there that night.

364 U.S. at 262 (footnote omitted).

¹⁷ *Terry v. Ohio*, 392 U.S. 1, 21 (1968) (footnote omitted).

¹⁸ *Id.* at 27.

Once outside, the officer said to Sibron, "You know what I am after." According to the officer, Sibron "mumbled something and reached into his pocket." Simultaneously, Patrolman Martin thrust his hand into the same pocket, discovering several glassine envelopes, which, it turned out, contained heroin.¹⁹

With some ambivalence, the trial court concluded that the officer had probable cause to arrest Sibron and that the search was properly incident to that arrest. That court did not rely on the New York stop-and-frisk statute. The New York Court of Appeals affirmed without opinion,²⁰ but the dissent there indicated the majority decision was based on the New York statute.²¹ That statute was also urged as justification for the police conduct in the state's initial brief filed with the United States Supreme Court opposing jurisdiction.²² After probable jurisdiction was noted by the Court, the New York County Attorney tendered a confession of error.²³

Despite claims that the issue in *Sibron's* case was moot, and despite the confession of error, the Court decided the case on the merits. At the same time, the Court refused to decide the constitutionality of the New York statute.²⁴

The Court, in five opinions, reversed *Sibron's* conviction. Chief Justice Warren again wrote the majority opinion, concurred in by Justices Brennan, White, Stewart, and Marshall. Justice Douglas, in a separate opinion, seemed to agree with the approach of the majority. Justice Harlan reiterated the analysis he advocated in *Terry*.²⁵ Justice Fortas would have given more weight to the confession of error, and Justice Black dissented on the ground that the police action was taken in reasonable self-defense.

The majority, as they had in *Terry*, defined the frisk as the intrusion that had to be justified because, they concluded, the record was unclear whether *Sibron* was under restraint before the

¹⁹ *Sibron v. New York*, 392 U.S. 40, 45 (1968).

²⁰ *People v. Sibron*, 18 N.Y.2d 603, 219 N.E.2d 196, 272 N.Y.S.2d 374 (1966).

²¹ *Id.* at 604, 219 N.E.2d at 197, 272 N.Y.S.2d at 376.

²² *Sibron v. New York*, 392 U.S. 40, 47-48 (1968).

²³ *Id.* at 48.

²⁴ *Id.* at 61. The failure of the Court to deal with the New York stop-and-frisk statute undoubtedly came as a surprise to many observers. The position of the majority seems to have been that the statute is so vague that the Court could not tell exactly what it authorized and therefore could not determine its constitutionality. *Id.* at 60-61 n.20.

²⁵ See text accompanying notes 54-57 *infra*.

search occurred. They held that the evidentiary requirement for a self-protective search was not present in this case, and that the search was not properly limited in scope because it extended beyond patting down the exterior of the suspect's clothing. Thus, *Sibron* was clearly an effort to indicate that the thrust of *Terry* was not to give the constitutional imprimatur to coercive intrusions based on evidence as slight as that present in this case.

Peters v. New York. During the afternoon, an off-duty New York City patrolman, Lasky, heard noises at his sixth-floor apartment door. He received a telephone call and after he hung up, he looked into the hall through a peep-hole in his door and saw two men tiptoeing down the hall. He did not recognize them as residents of his apartment building. He telephoned the local Mount Vernon police, completed dressing, and returned to the door. The strangers were then tiptoeing toward the stairway although an elevator was available. As Lasky emerged into the hall armed and slammed his apartment door the suspects fled down the stairs. He apprehended one of them after a chase covering a flight and a half of stairs. The other man escaped. The officer asked the detained suspect what he was doing in the building. Peters claimed he was looking for a girlfriend but said he would not identify her because she was married. The officer took him down another half flight of stairs to the fourth floor and frisked him. He felt something hard in the suspect's pants pocket and testified it "could have been" a knife. He removed an unsealed opaque plastic envelope and found burglary tools in it. The suspect was convicted on his guilty plea for unlawful possession of burglary tools after the trial court denied his pretrial motion to suppress the evidence obtained by Officer Lasky.

Every member of the Court except Justice Harlan agreed that probable cause existed to arrest Peters for attempted burglary. The New York Court of Appeals had clearly felt the conduct of the officer could be justified only on the basis of the stop-and-frisk statute.²⁶ The notion that probable cause existed to arrest for any crime was not mentioned in their opinion. The majority of the Court adverted to this rationale of the New York Court of Appeals, but observed: "This may be the justification for the search under state law. We think, however, that for purposes of the Fourth Amend-

ment the search was properly incident to a lawful arrest. By the time Officer Lasky caught up with Peters on the stairway between the fourth and fifth floors of the apartment building, he had probable cause to arrest him for attempted burglary."²⁷ As if *Terry* had never been decided, the Court found that Peters was arrested the moment he was restrained and that the search was incident to that lawful arrest. Despite their conclusion that Peters was properly arrested, the Court justified the subsequent search with the conclusion that "Officer Lasky did not engage in an unrestrained and thorough-going examination of Peters and his personal effects. He seized him to cut short his flight, and he searched him primarily for weapons. While patting down his outer clothing, Officer Lasky discovered an object in his pocket which might have been used as a weapon."²⁸ This language appears to be a justification for a *Terry*-type frisk rather than a statement of traditional authority to search incident to an arrest. Certainly, searches justified as "incidental" to arrest are not limited to searching for weapons, nor are they restricted to patting-down outer clothing.

These problems again prompted Justice Harlan to concur specially. He disagreed with the majority's conclusions that probable cause to arrest existed at the time Peters was restrained. He also objected to what appeared to be a reversion by the majority to the earlier arrest-or-nothing analysis of cases like *Rios* which the Court had expressly eschewed in *Terry*. Indeed, *Rios* and *Henry* are prominent in the majority opinion. Part of the disagreement also seems to be whether probable cause to arrest and the arrest must precede the search as the majority opinion implied, or whether it suffices if probable cause to arrest exists prior to the search, whether or not the arrest has actually occurred. Justice Harlan argued that "[t]here is no case in which a defendant may validly say, 'Although the officer had a right to arrest me at the moment when he seized me and searched my person, the search is invalid because he did not in fact arrest me until afterwards.'"²⁹

²⁷ *Sibron v. New York*, 392 U.S. 40, 66 (1968).

²⁸ *Id.* at 67.

²⁹ *Id.* at 77 (concurring opinion). Similar views of the propriety of a search-then-arrest sequence is gaining judicial support. See, e.g., *Holt v. Simpson*, 340 F.2d 853 (7th Cir. 1965). The problem is discussed in Barrett, *Personal Rights, Property Rights, and the Fourth Amendment*, 1960 SUP. CT. REV. 46.

²⁶ *People v. Peters*, 18 N.Y.2d 238, 219 N.E.2d 595, 273 N.Y.S.2d 217 (1966).

FIELD INTERROGATION AS A CONTROL ON INTENDING CRIMINALS

Glanville Williams has argued that "[i]n a rational system of justice the police would be given every encouragement to intervene early where a suspect is clearly bent on crime. Yet in England, if the police come on the scene too early they may find that they can do nothing with the intending offender except admonish him."³⁰ The formal law situation has not been strikingly different in American jurisdictions. The important—and unanswered—question is this: Is it part of the function of the police to try to prevent crime by physically interrupting persons believed to be contemplating a crime? Remarkably little attention has been given to this question. Present field interrogation practices raise this issue.

Many police feel they need authority to engage in what they call "aggressive, preventive patrol" practices. Police departments are often assigned and accept responsibility for crime rates in a city, and they often gauge their effectiveness as police not so much by the percentage of crimes "cleared" but by whether or not they can reduce the incidence of crime. Procedural restrictions on police interferences with citizens, on the other hand, usually have been thought to limit police authority to those instances in which the police have evidence indicating a suspect probably has committed a crime.³¹

The tensions between these competing assumptions about the proper scope of police authority have been exposed predominately in the vagrancy law controversy. The New York Court of Appeals, for example, declared unconstitutional the New York vagrancy statute partly because the authority to arrest under these types of laws was used by the police to avoid restrictions imposed by substantive and procedural codes.³² A second practice which raises the issue is the unsystematic legislative responses to particular inchoate behavior such as both *Terry* and *Peters* involved. The suspect who was intending to commit armed robbery can be arrested because he will be found to be in the possession of a concealed weapon. So, too, in many states, the incipient burglar may be arrested if he brought along specialized tools, but not otherwise.

³⁰ Williams, *Police Control of Intending Criminals*, 1955 CRIM. L. REV. 66.

³¹ See Tiffany, *Field Interrogation: Administrative, Judicial and Legislative Approaches*, 43 DENVER L.J. 389, 395-98 (1966).

³² Fenster v. Leary, 20 N.Y.2d 309, 229 N.E.2d 426, 282 N.Y.S.2d 739 (1967).

Convictions for anything but vagrancy under these circumstances are not possible unless exceptional, fortuitous circumstances are also present. Preparation to commit a crime is not made criminal *per se* so that whether an intending criminal may be arrested for prosecution is essentially left to chance. This discrepancy between what police assume to be their role and the limitations imposed by rules embodying a contrary assumption is probably largely responsible for the long life accorded vagrancy laws and is reflected in the proliferation of possession-with-intent type of statutes.

Field interrogation raises the same question. Both case law and existing statutes authorizing field interrogation permit police to stop, question, and frisk when they have evidence indicating that the suspect is about to commit a crime. Indeed, the Model State Statute on "Stop and Frisk" which has been prepared and distributed by the Americans for Effective Law Enforcement provides: "Whenever any peace officer of this state encounters any person under circumstances which reasonably indicate that such person has committed, is committing, or is about to commit a criminal offense, he may detain such person." The position paper which accompanies the circulation of this proposal makes it clear that the field interrogation authority includes the power to engage in detention designed to prevent the commission of crime as well as to detect perpetrators:

Even when the police are forced to release the suspect because of his refusal to answer questions or because no evidence of an attempted crime is found at the scene, the very act of temporary detention and questioning may deter, at least for that night, a potential criminal act of violence. That, in itself, would be a worthwhile result, since the duty of the police is not only to apprehend persons who have already committed criminal acts, but also to prevent crimes from occurring in the first place.³³

Thus, these rules do encourage the police to intervene early, but the police may not arrest unless the frisk turns up something upon which to base a prosecution.

To the extent that field interrogation practices are conceived to range well beyond conviction-

³³ The model act and the accompanying commentary can be obtained from Americans for Effective Law Enforcement, Inc., 33 North Dearborn Street, Chicago, Illinois 60602.

oriented processes and to include as well efforts to control intending criminals by non-conviction means, questions are raised whether these preventive practices can realistically be separated from other, less desirable practices and whether such preventive practices can be controlled.

Field interrogation is only one of the specific practices engaged in by police under the rubric "aggressive, preventive patrol." Many other practices are attributable to the same orientation to prevent crime from being committed in the first place. The following paragraphs are a description of one such practice, the so-called "battle of the corner."³⁴

Both uniformed patrolmen and members of the Juvenile Aid Division, but primarily the former, engage in constant confrontation with Negro youths who congregate on streetcorners in the urban area. The youths insist on what is called corner-lounging, and the police insist on dispersing them. Recalcitrance is punished by arrest. The study concluded:

"Interviews with both juveniles and District policemen reveals something of the dynamics of the 'battle of the corner.' Both apparently see these encounters as challenges to their manhood. Neither party expresses a willingness to allow the corner to go to the other by default. In many respects, both parties view the encounters as a game, albeit a deadly serious game. Among some of the younger officers, one encounters a sense of dedication never to lose the battle of the corner. Part of the young policeman's lore is the fact that losing the battle is seen as one of the most serious 'defeats' a policeman can suffer. Older officers, of course, have often tired of these encounters and unconsciously avoid 'showdowns.' Many of them, however, also reveal an unwillingness to lose if a showdown is unavoidable.

"The drawing of the battle lines,' however, has apparently been as much the consequence of public pressure as it has been the product of the policeman's action. In numerous interviews, policemen justify their dispersal of corner-lounging groups on the basis of complaints from the public. Visitations to various neighborhoods in the city

and to various District police confirms the fact that there are many public complaints about corner-lounging groups creating a disturbance or shouting insults or obscenities. Furthermore, many policemen use their selective experience to point to the fact that many groups assemble on the corner as a prelude to more serious misbehavior and delinquency."³⁵

The relationship of this type of practice to field interrogation depends largely upon one's definition of field interrogation.³⁶ The practices often involve questioning, detention, and searching. Nevertheless, they are functionally different from those situations in which the police are trying to obtain information about the commission of crime. The point is not that the kind of field interrogation involved in *Terry* is indistinguishable from these preventive practices; it is rather that police have not made sufficient efforts to maintain the distinction in practice.³⁷ Related prevention practices often shade imperceptibly into police assumption of control of movement in public places, at least in high crime areas at night.³⁸ Such practices are often what the police take "crime prevention" to mean.

One of the ironies of empirical research into the field-interrogation question is that the most difficult problem of such research is to isolate conceptually those instances in which the police stop and question a person whose conduct has raised a fair question as to his involvement in criminal activity from all the other things that patrol officers do, including indiscriminately conducted stop-and-search programs designed to confiscate guns, and harassment of teenagers in minority areas.³⁹ There are probably few observers who would completely deny the utility and necessity of stopping and questioning suspects when probable cause to arrest does not exist—if, that is, temporary on-the-street detention power would be carefully limited in actual day-to-day police practices. Just as obviously, present street practices in many cities are unjustified and harmful.

Thus, one of the dominant themes running through the controversy over the legitimacy of field interrogation relates primarily to the anticipated (and present) abuse of the power to in-

³⁵ *Ibid.*

³⁶ See DETECTION, *supra* note 5, ch. 1.

³⁷ See text accompanying note 11 *supra*.

³⁸ See DETECTION, *supra* note 5, ch. 1.

³⁹ *Ibid.*

³⁴ IV FIELD SURVEYS, LOHMAN & MISNER, *THE POLICE AND THE COMMUNITY: THE DYNAMICS OF THEIR RELATIONSHIP IN A CHANGING SOCIETY*, vol. 2, at 156 (1967).

terfere with persons who may not be arrested. Aggressive tactics are common. They are often largely motivated by poorly articulated efforts to somehow prevent crimes and are encouraged in many instances by police efforts to remain "in charge" of the streets. The importance of *Terry* in this context is whether Court authorization for the police to "deal with" possibly intending criminals in ways not involving efforts to prosecute will be interpreted by the police as lending support to such tactics.

Chief Justice Warren adverted at some length to the inadequacy of the exclusionary rule as a control on police-citizen encounters which are not motivated by a desire on the part of the police to secure evidence usable in a criminal prosecution. For the majority in *Terry*, he observed: "Regardless of how effective the rule may be where obtaining convictions is an important objective of the police, it is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forego successful prosecution in the interest of serving some other goal."⁴⁰ Yet the Court concluded, in response to defense arguments, that the existence of a "protean variety" of street encounters ought not to result in "a rigid and unthinking application of the exclusionary rule, in futile protest against practices which it can never be used effectively to control. . . ."⁴¹ Further, the Court said, "our approval of legitimate and restrained investigative conduct undertaken on the basis of ample factual justification should in no way discourage the employment of other remedies than the exclusionary rule to curtail abuses for which that sanction may prove inappropriate."⁴²

It is important, however, to determine exactly what the Court means by "legitimate and restrained investigative conduct." There is language in these cases which indicates that at least several members of the Court are willing to recognize police authority to interfere with persons despite the indication that the "suspect" cannot be convicted of any offense. The majority in *Terry* said a legitimate state interest is "effective crime prevention and detection."⁴³ Justice White, speaking about the frisk in that case, said: "Perhaps the frisk itself, where proper, will have beneficial re-

sults whether questions are asked or not. If weapons are found, an arrest will follow. If none are found, *the frisk may nevertheless serve preventive ends because of its unmistakable message that suspicion has been aroused.*"⁴⁴ Even Justice Douglas, dissenting, argued that searches and seizures must be predicated on probable cause, but that fourth amendment standards are satisfied if the officer has probable cause to believe that "a crime was *about* to be committed."⁴⁵

Justice Harlan concluded in his concurring opinion that the officer's conduct in *Sibron* fell below *Terry* standards and observed: "There must be something at least in the activities of the person being observed or in his surroundings that affirmatively suggests particular criminal activity, completed, current, or intended."⁴⁶

Justice Harlan agreed that *Peters* should be affirmed, but on the basis of the right to stop and question, not on the majority's view that probable cause to arrest existed. He observed that probable cause has been taken to mean: "Evidence that would warrant a prudent and reasonable man . . . in believing that a particular person has committed or is committing a crime."⁴⁷ The omission of reference to future conduct of the suspect was deliberate: "unlike probable cause to arrest, reasonable grounds to stop do not depend on any degree of likelihood that a crime *has* been committed. *An officer may forcibly intrude upon an incipient crime even where he could not make an arrest for the simple reason that there is nothing to arrest anyone for.*" Hence although Officer Lasky had small reason to believe that a crime had been committed, his right to stop *Peters* can be justified if he had *a reasonable suspicion that he was about to attempt burglary.*"⁴⁸ Justice Douglas, concurring in the affirmance of *Peters*' conviction, took this position: "I would hold that at the time Lasky seized petitioner, he had probable cause to believe that petitioner was on some kind of burglary or housebreaking mission."⁴⁹

One implication of this language is that preventive—or at least anticipatory—searches and seizures are not necessarily incompatible with the fourth amendment. But *Terry* does little to resolve the uncertainty. Indeed, the ambiguous fourth

⁴⁴ *Id.* at 34-35 (concurring opinion) (emphasis added).

⁴⁵ *Id.* at 35 (dissenting opinion) (emphasis added).

⁴⁶ *Sibron v. New York*, 392 U.S. 40, 73 (1968) (concurring opinion) (emphasis added).

⁴⁷ *Id.* at 75 (footnote omitted).

⁴⁸ *Id.* at 78 (emphasis added).

⁴⁹ *Id.* at 69 (concurring opinion).

⁴⁰ *Terry v. Ohio*, 392 U.S. 1, 14 (1968) (footnote omitted).

⁴¹ *Id.* at 15.

⁴² *Ibid.*

⁴³ *Id.* at 22.

amendment status of police coercive intrusions which are not designed to secure convictions is significantly perpetuated by these cases. Certainly, the question is important enough to require more critical evaluation than the Court has thus far given it. It is not clear that a majority of the Court would be willing to unambiguously hold that there are instances in which the police may coercively intrude upon a person they believe may be contemplating the commission of a crime. It is clear, however, that the exclusionary rule will have little or no impact as a control device on this species of anticipatory detention because of the underlying assumption of that rule that overly aggressive police tactics are designed to secure convictions. But the Court gives considerable support to those "preventive" practices despite recognition that such practices may be beyond the control of the judiciary.

THE ROLE OF CONSENT IN FIELD INTERROGATION PRACTICES

Another important question in field interrogation practices is left unresolved by the *Terry* doctrine and follows both from the fact that the Court did not address the question of limitations upon the purposes of legitimate field interrogations and from the fact that the Court declined to deal with the question of detention prior to the frisk of the suspects. Because the police were obviously dealing with suspects in all three cases, the Court addressed only the question of police-suspect confrontations. Thus, the question whether judicial application of notions about consent might vary significantly when the person confronted is believed to be a witness, in contrast to the instance in which he is believed to be a perpetrator, was not clarified.⁵⁰ But even when it is clear that the

⁵⁰ The pre-*Terry* draft of the ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE (Tent. Draft No. 1, 1966) does provide for authority to interrogate witnesses. Section 2.02(1) provides:

Stopping of Persons Having Knowledge of Crime.

A law enforcement officer lawfully present in any place may, if he has reasonable cause to believe that a felony or misdemeanor has been committed and that any person has knowledge which may be of material aid to the investigation thereof, order such person to remain in or near such place in the officer's presence for a period of not more than twenty minutes.

Police authority in this section which covers both suspects and witnesses is more restricted than when only a suspect is involved. Section 2.02(2), which covers only suspects, has a lower evidentiary standard:

Stopping of Persons in Suspicious Circumstances.

police are dealing with a suspect, the Court seems willing to give considerable latitude to consent doctrines.

The Court in *Terry* refused to treat the initial confrontation as involving restraint.

"We thus decide nothing today concerning the constitutional propriety of an investigative 'seizure' upon less than probable cause for purposes of 'detention' and/or interrogation. Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred. We cannot tell with any certainty upon this record whether any such 'seizure' took place here prior to Officer McFadden's initiation of physical contact for purposes of searching Terry for weapons and we thus may assume that up to that point no intrusion upon constitutionally protected rights had occurred."⁵¹

The Court took a parallel position in *Sibron*: "We are not called upon to decide in this case whether there was a 'seizure' of Sibron inside the restaurant antecedent to the physical seizure which accompanied the search."⁵² The Court concluded that the record would not permit a determination "whether Sibron accompanied Patrolman Martin outside in submission to a show of force or authority which left him no choice, or whether he went voluntarily in a spirit of apparent cooperation with the officer's investigation."⁵³ On the other hand, in *Terry*, the Court pointed out that "[i]t is quite plain that the Fourth Amendment governs 'seizures' of the person which do not eventuate in a trip to the station house and

A law enforcement officer lawfully present in any place may, if a person is observed in circumstances which suggest that he has committed or is about to commit a felony or misdemeanor, and such action is reasonably necessary to enable the officer to determine the lawfulness of that person's conduct, order that person to remain in or near such place in the officer's presence for a period of not more than twenty minutes.

However, the difference in standards may be illusory, because in any high crime area, the police always have reasonable cause to believe that a crime has been committed unless the section is interpreted to be more limited in terms of location or immediacy than the language requires.

⁵¹ *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968).

⁵² *Sibron v. New York*, 392 U.S. 40, 63 (1968).

⁵³ *Ibid.*

prosecution for crime—'arrests' in traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."⁵⁴

One result of the Court's refusal to treat the initial confrontation in these cases as involving detention was that the Court was called upon to determine only the propriety of the frisk and thus avoided a decision about the evidentiary basis of an initial investigatory detention not accompanied by a frisk. This, of course, obscures the question whether there are differences in the standards justifying the two actions.

The more important question left unanswered is: When, if ever, should a confrontation between a police officer and a suspect not be treated as involving restraint? The Court was careful to point out that the treatment of the initial confrontations in these two cases as being without restraint had no material impact on the disposition. At some point between confrontation and taking a suspect to the station restraint occurs, and the only guidance given on the question is that restraint will be found to be involved when there is a "show of force," a term left undefined by the Court. Whether a "confrontation" of a suspect is a "show of force," or whether that term should refer to something like display of weapons, is an important question to resolve.

The majority view that Terry and Sibron may have voluntarily cooperated in their undoing led Justice Harlan to feel "constrained to fill in a few gaps. . . ." ⁵⁵ He differed from the approach of Chief Justice Warren in two major respects. First, "if the frisk is justified in order to protect the officer during an encounter with a citizen, the officer must first have constitutional grounds to insist on an encounter, to make a *forcible* stop." ⁵⁶ Second, "[w]here such a stop is reasonable, however, the right to frisk must be immediate and automatic if the reason for the stop is, as here, an articulable suspicion of a crime of violence." ⁵⁷ He concluded that "Officer McFadden's right to interrupt Terry's freedom of movement and invade his privacy arose only because circumstances warranted forcing an encounter with Terry in an effort to prevent or investigate a crime. Once that forced encounter was justified, however, the of-

ficer's right to take suitable measures for his own safety followed automatically" when the original suspicion related to a crime of violence.⁵⁸

In a large majority of encounters between police and citizens, or even between police and suspects, it is quite ambiguous whether the citizen is under restraint, if that term refers to whether or not he can walk away. One of the main problems with assuming, in the absence of clear evidence to the contrary, that suspects may voluntarily cooperate with the police during a field interrogation is that the right to be free from the annoyance of public inquiries by the police may belong only to those persons who are willing to risk resolution of the ambiguity inherent in those encounters. This is an especially undesirable judicial policy given the fact that refusal to "cooperate" with beat-patrol officers is often viewed by them both as an indication that the suspect is in fact guilty of something and as an attempt on the suspect's part to undermine the authority of the investigating officer.⁵⁹ Furthermore, the suspect has no way to decide whether the investigating officer has authority to stop him or not.

It may have been somewhat understandable that the judiciary would rely on notions of consent or cooperation to resolve fourth amendment problems in this context when they were required to choose between consent and arrest as the only justifications for evidence acquisition by police. But recognition of coercive investigative authority in the absence of probable cause to arrest ought to alleviate the pressure to resolve ambiguous confrontations by creation of a presumption of consent. In terms of an evidentiary antecedent, a request for cooperation need not be reasonable in the constitutional sense, and even the *Terry* evidence-of-guilt standard need not be met.

An additional problem with the consent doctrine in this context is that it is doubtful that courts could realistically and uniformly resolve factual matters which involve the subtle psychological interaction in police-suspect confrontations.⁶⁰ Difficulty of adjudication alone might be insufficient reason to deny the police needed authority to investigate crime. The question is whether the need to use consent doctrines still exists. It would be an unfortunate diversion from the significant fourth amendment issues involved in field interrogation to

⁵⁴ *Terry v. Ohio*, 392 U.S. 1, 16 (1968).

⁵⁵ *Id.* at 31 (concurring opinion).

⁵⁶ *Id.* at 32.

⁵⁷ *Id.* at 33.

⁵⁸ *Id.* at 34.

⁵⁹ DETECTION, *supra* note 5, at 57.

⁶⁰ See, e.g., Project, *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L.J. 1519 (1967).

focus on whether the suspect voluntarily cooperated rather than focusing on the justification for the police conduct involved.

A dichotomic approach to that problem expressed in terms of "detention" versus "voluntary cooperation" is less than helpful. To observe that not all police-suspect confrontations are coercive is beside the point. If courts will be unable realistically to evaluate the assorted reasons suspects may appear to be cooperative with an investigating officer, the task is to select the policy that would be most responsive to the need to resolve the competing interests. The Court's recognition that any restraint of suspects by police brings that conduct within the fourth amendment's requirement of reasonableness will provide little protection as long as police can take legal advantage of the ambiguity inherent in most street confrontations.

CONCLUSION

Too often the assumption has been made that when the courts deal with something called "criminal procedure" they are concomitantly dealing with most of the significant problem areas of police conduct. The Court candidly recognized that this assumption is grossly inaccurate. In large part this litigation hiatus is due not so much to the ambit of the fourth amendment as it is to the scope of remedies used to control and limit police activities. The exclusionary rule, of course, is currently the most frequently invoked remedy. The formal limitations on that remedy are numerous, and the conditions under which it may be thought to be effective are quite limited. First, it cannot be effective unless illegally obtained evidence is needed by the state to convict the defendant, and this will not be the case when improper police conduct does not result in state acquisition of evidence or when the state has other evidence sufficient to convict. Second, many procedural obstacles exist to limit the frequency of invocation of the rule. If the appropriate motion is not made at the appropriate time, the issues may escape formal litigation. Given the predominance of the guilty plea system in all jurisdictions, it is likely that most questions of police illegality become only additional factors in the bargaining process. The defendant must also have satisfied "standing" requirements to move to suppress. Third, indirect uses may still be made of illegally obtained evidence, such as by introduction at trial of that evidence to impeach the defendant; and, the so-

called "fruits" doctrine cannot prevent all indirect benefit to the police.

Finally—and this is the main problem—the exclusionary rule derives whatever efficacy it may have from the underlying assumption that when the police engage in illegal conduct it is for the purpose of securing a conviction. The fallacy in this assumption has been amply documented.⁶¹ It should be hoped that the Court's explicit recognition of this limitation in *Terry* will contribute to increased attention to that "protean variety" of police-citizen confrontations which do not contemplate prosecution. Preoccupation with the propriety of methods of obtaining convictions has been the natural result of preoccupation with appellate cases. The point is not to belittle the significance of concern with the manner of obtaining convictions; obviously, research of the type now underway concerning the impact of *Miranda*,⁶² as one example, is vital to any sensible rulemaking designed to control conviction-oriented aspects of police practices. The point is that conviction processes are not all that is important about police practices. Indeed there is some evidence that conviction processes are becoming relatively less important as the way in which our criminal justice systems manage rulebreaking.⁶³

Development of meaningful controls over this aspect of police work will require more adequate identification and description of those practices and identification of the pressures or conditions contributing to their widespread existence. Most important is recognition that control over non-conviction processes cannot be relegated to the courts armed only with the exclusionary rule.

Whether police on-the-street intrusive practices are oriented toward conviction or not, the need for adequate standards and controls is difficult to overstate. One interpretation of *Terry* is that the Court for the moment has left the initial responsibility for this to the relevant administrative agencies. The problems are difficult, but it is important that they be resolved intelligently and as quickly as possible. In the absence of positive departmental responses which give some indication of police awareness of an obligation to accept the opportunity provided by *Terry* to behave like responsible administrative agencies, it is likely

⁶¹ See, e.g., LAFAYE, *supra* note 5.

⁶² An excellent comment on *Miranda* research may be found in ALI MODEL CODE OF PRE-ARRESTMENT PROCEDURE, Part II (Study Draft No. 1, 1968).

⁶³ Linton, Administrative Stabilization of Conviction Rates, August, 1968 (unpublished paper).

that future field interrogation cases decided by the Court will contain less doctrinal ambiguity and will be more restrictive on police.

The likelihood exists, of course, that *Terry* will not be viewed this way by police officials. Because of the vagueness of the language used on many of the important issues and because of the approval of the police conduct leading to *Terry*'s conviction, *Terry* may be taken as broad approval of current police field interrogation practices. If that view of *Terry* is prevalent and has the effect of encouraging present aggressive police tactics on the street, the dominant impact of *Terry* may be to encourage more and more judicial intervention to curtail those practices.⁶⁴

The major doctrinal implication of *Terry* was underscored by Justice Douglas in his dissent: He pointed out that "[w]e hold today that the police have greater authority to make a 'seizure' and conduct a 'search' than a judge has to authorize such action."⁶⁵ Presumably this is so because it is thought that judges are limited to the traditional warrant-issuance process, and that the prerequisite under that procedure will continue to be a higher evidentiary standard ("probable cause") than is required of police by *Terry* for field interrogation ("reasonableness"). Obviously the role of magistrates in enforcing the fourth amendment has never been as significant as the authority exercised by contemporary police,⁶⁶ and this is true despite

⁶⁴ "This attitude [of justifying failure to observe procedural restrictions imposed by courts] often prompts the imposition of even greater restrictions on police authority. Courts are undoubtedly influenced by their assumption as to how police will react to legal requirements. If there is confidence that they will stay well within defined limits, their powers may be stated broadly; but, if it is thought that they will regularly exceed the limits, the tendency is to impose severe and perhaps unrealistic limitations upon their authority."

LAFAVE, *supra* note 5, at 512 (footnotes omitted).

⁶⁵ *Terry v. Ohio*, 392 U.S. 1, 36 (1968) (dissenting opinion).

⁶⁶ Barrett, *Criminal Justice: The Problem of Mass Production, in THE COURTS, THE PUBLIC, AND THE LAW EXPLOSION* 85, 117-18 (Jones ed. 1965). Professor LaFave has concluded:

"The assumption apparently is that greater protection for the individual is afforded by the warrant procedure, since an arrest will be made only if an impartial judicial officer, upon careful evaluation of the evidence presented to him, determines that adequate grounds for an arrest exist. But, at least in Kansas, Michigan, and Wisconsin, it is clear that the warrant process does not serve this function. Rather, the decision is made in the office of the prosecutor and the judge routinely signs the arrest warrant without any independent

the fact that the Court still romantically treats arrests without warrants as the "exceptional" case and extols the virtues of the warrant process.⁶⁷ But *Terry* represents the most important instance of doctrinal recognition of this reality. The response of police administrators to *Terry* may be one of the most important factors controlling the longevity of this doctrinal shift.

A few of the current problems that inhere in judicial efforts to control the police practice of field interrogation have already been identified. The exclusionary rule cannot control police activity which is not directed toward conviction, and judicial reliance on notions of consent removes field interrogation from the ambit of fourth amendment requirements because no "seizure" is found to have occurred. But there is still another dimension to the problem. Judicial efforts to control "the police" often seem to be based on an assumption that police departments are monolithic. As a result little distinction has been made between efforts to control the police hierarchy in the United States on the one hand and efforts to control the patrolman on the other. Efforts to control the hierarchy assumes that the high-level administrators have effective control over patrolmen. Efforts to control the patrolman assumes that he is more responsive to external judicial control than he is to the requirements of his sergeant. Both of these assumptions are of doubtful validity.

It is especially the doubt about how much control the police higher echelon has over the day-to-day decision-making of the officer on patrol that renders fatuous any predictions about the efficacy of adoption of field interrogation standards by many departments in the wake of *Terry*.⁶⁸ Still,

inquiry into the facts and circumstances of the individual case."

LAFAVE, *supra* note 5, at 502-03. See also DETECTION, *supra* note 5, ch. 8; Miller & Tiffany, *Prosecutor Dominance of the Warrant Decision: A Study of Current Practices*, 1964 WASH. U.L.Q. 1, 17:

"It is difficult to analyze comparatively the formal law and current administrative practices in the area of control over warrant issuance without concluding that an aura of unreality surrounds the problem. Nowhere does the declared law seem so at odds with the facts of the law in action. Yet the formal law statements—as well as expressed concern over the situation—seem, on the surface at least, to be aimed at shadows. The substance is not at all what the commentators seem to assume it is."

⁶⁷ *E.g.*, *Warden v. Hayden*, 387 U.S. 294 (1967).

⁶⁸ Several police departments have issued training bulletins on Stop-and-Frisk, among them being:

the adoption of such administrative rules is a necessary step in the development of administrative or other mechanisms designed to bring police

Chicago, Denver, Gary, New York City, Pittsburgh, and San Jose, California. In each of these cases, the bulletins were written by the department's Legal Advisor.

"aggressive, preventive patrol" practices under control. Thus, the ability of departments to acquire control of the behavior of their patrolmen on the street is also likely to be of significance for the survival of what is now taken to be rather broad authority to maintain police field interrogation practices.